

Leave It to the Lower Courts: On Judicial Intervention in Election Administration

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*This Article considers the relationship between the lower courts and the Supreme Court in the field of election administration, focusing on the Court's recent opinion in *Purcell v. Gonzalez*. It argues that the Supreme Court should exercise exceptional restraint in this area given: (1) the factual complexity of these cases, (2) the weighty democratic values on both sides, (3) the unusual procedural context in which these cases tend to arise, which often necessitate expedited consideration, and (4) the heated political atmosphere that typically surrounds election administration disputes. The Article begins by surveying the doctrinal and institutional changes resulting from Florida's 2000 election controversy and *Bush v. Gore*. It then looks to the lower courts, assessing their handling of cases involving voting technology and voter identification. In general, the lower courts have done a capable—though certainly not perfect—job of handling the increased election litigation filed since 2000. Finally, the Article discusses and critiques *Purcell*, the one significant case since *Bush* in which the Supreme Court has intervened. The Court's troubling intervention in *Purcell* illustrates why, as a general matter, election administration disputes are better left to the lower courts. Particularly when it comes to hot-button issues like voter identification that have a pronounced partisan valence, such intervention threatens to distort equal protection doctrine and undermine the Court's institutional credibility.*

I. INTRODUCTION

The incoherence of the Supreme Court's election law jurisprudence is a recurring theme of this Symposium. Guy Charles, for example, describes the Court's "futile quest to bring some coherence" to the law of partisan gerrymandering,¹ while Rick Pildes alludes to the Court's "indecisive floundering" in this area.² Michael Kang observes that *LULAC v. Perry*

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¹ Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1185 (2007).

² Richard H. Pildes, *The Roberts Court and the Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140 (2007).

leaves “the law of partisan gerrymandering . . . as muddled as beforehand.”³ Similar criticisms dog the Supreme Court’s decisions regarding campaign finance regulation and come from both sides. Brad Smith notes the “emptiness” of *McConnell v. FEC*,⁴ while Rick Hasen laments the “newer incoherence” evident in the Supreme Court’s case law culminating in *Randall v. Sorrell*.⁵ Pam Karlan emphasizes the pronounced disagreement within the Court on both political gerrymandering and campaign finance regulation.⁶ As she puts it: “The Court is not just divided; it is splintered.”⁷

This Article considers how such incoherence might be avoided in the field of election administration,⁸ in which the Supreme Court has been relatively quiet since *Bush v. Gore*.⁹ In taking on this question, I endeavor to follow Michael Solimine’s wise suggestion that election law scholars attend to the institutional role of the federal courts generally and the Supreme Court in particular.¹⁰ I also draw on Ned Foley’s thoughtful analysis of *Bush v. Gore* and the lawsuits it has inspired.¹¹

Although I am more sympathetic to *Bush v. Gore*’s equal protection reasoning than other commentators,¹² I believe it is a good thing that the Supreme Court has, with one notable exception, left election administration disputes to the lower courts since 2000. I also think that, for the most part, the lower courts—especially federal district courts—have capably handled the election administration litigation that has ensued. In some cases, they

³ Michel S. Kang, *When Courts Won’t Make Law: Judicial Paralysis and Partisan Gerrymandering*, 68 OHIO ST. L.J. 1097, 1097 (2007).

⁴ Bradley A. Smith, *The John Roberts Salvage Company: After McConnell, a New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 901 (2007).

⁵ Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 849 (2007).

⁶ Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 745 (2007).

⁷ *Id.*

⁸ By “election administration,” I mean the set of nuts-and-bolts issues surrounding the functioning of our election system, including registration, voting machines, provisional ballots, voter identification, and recounts.

⁹ 531 U.S. 98 (2000).

¹⁰ Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law in the Supreme Court*, 68 OHIO ST. L.J. 767, 767 (2007).

¹¹ Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925 (2007).

¹² See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2487–90 (2003). For a less generous perspective on *Bush v. Gore*, see the authorities cited *id.* at 2487 n.424, including Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001).

have granted relief to plaintiffs that has prevented citizens' voting rights from being violated.¹³ Even where courts have not granted relief to plaintiffs, the lower federal courts' intervention has played a productive role in clarifying the law or spurring settlement.¹⁴

The relative efficacy of the lower courts in handling these cases is partly attributable to the hands-off approach taken by the Supreme Court, which has for the most part steered clear of election administration since 2000. The one significant exception exemplifies the hazards of the Supreme Court intervening in election disputes. In *Purcell v. Gonzalez*,¹⁵ the Court issued an opinion that demonstrated a failure to think carefully through the appropriate role of the federal judiciary in election administration and threatens to distort equal protection analysis of claims in the area. Although it is too soon to say whether the Court's opinion will do long-term damage, *Purcell* provides a cautionary lesson in the dangers of rushing to judgment on an unfamiliar issue without recognizing the underlying political realities or the competing democratic values at play. It also provides reason for worrying about what the Court will do in the Indiana voter identification case, *Crawford v. Marion County Election Board*, for which certiorari was granted shortly before this article went to press.

As the Court's performance in *Purcell* illustrates, several features of election administration litigation call for particular restraint on the part of the Supreme Court: (1) the fact-intensive character of most election administration disputes, (2) the weighty democratic values at stake, (3) their procedural posture, which often necessitates expedited consideration on an incomplete record, and (4) the heated political atmosphere in which these controversies tend to arise. These considerations suggest that the Court would do best to allow a thorough percolation of election administration issues in the lower courts rather than intervening as it did in *Purcell*. Such intervention threatens to undermine the Court's institutional credibility, particularly when it comes to hot-button issues like voter ID that have a pronounced partisan valence.¹⁶

¹³ I have previously discussed the constructive role of courts in cases surrounding the 2004 election in Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220–39 (2005) [hereinafter "Early Returns"].

¹⁴ See *id.* at 1243; *infra* Part III.

¹⁵ *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006).

¹⁶ See Solimine, *supra* note 10, at 70–71 (noting that judicial decision-making in election law is "particularly ripe for the accusation of partisan or result-oriented outcomes," making it "particularly important that the processes of judicial review are, and be perceived as, non-partisan in nature").

Part II reconsiders *Bush v. Gore*'s impact, in terms of both shaping doctrine and opening the courthouse doors. Part III focuses on the lower court litigation regarding voting technology and voter identification, probably the two most contentious election administration issues to emerge since 2000. Part IV critically examines *Purcell*, a case that should caution against aggressive Supreme Court intervention in future election administration cases. As a general matter, I argue, the Court would be better off leaving election administration to the lower courts.

II. TWO FACES OF *BUSH V. GORE*

Professor Foley's contribution to this Symposium helpfully classifies the various equal protection claims that have been made in lower courts since *Bush v. Gore*.¹⁷ Without endeavoring to summarize or criticize his taxonomy,¹⁸ I describe here two different—though not necessarily competing—ways in which to read the Court's holding in *Bush v. Gore*. The first focuses on inter-jurisdictional equality, putting the case in the context of the "one person, one vote" line of equal protection cases. The second focuses on excessive administrative discretion, drawing on First Amendment cases condemning imprecise schemes for regulating speech. I then explain why *Bush v. Gore* may actually be less important for the doctrine(s) for which it stands than for the symbolic opening of the federal court doors that it represents.

As an initial matter, I reject the suggestion that *Bush v. Gore* should be treated as *sui generis*, issuing a ruling that is unmoored to any larger legal principle and good only for that case on that day.¹⁹ Such an interpretation rests on the Court's statement that: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."²⁰ This language, however, warrants careful attention. The Court did *not* say that the broad equal protection principle it articulated was inapplicable to other election processes that might be challenged in the future. Instead, the Court's point was that such issues were simply not before it. As stated in the next sentence: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."²¹ Such

¹⁷ Foley, *supra* note 11, at 9–25.

¹⁸ See Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007 (2007) (commenting on and providing an alternative to Foley's taxonomy).

¹⁹ See *Stewart v. Blackwell*, 444 F.3d 843, 886–89 (6th Cir. 2006) (Gilman, J., dissenting) (adopting a narrow application of *Bush v. Gore*).

²⁰ *Bush v. Gore*, 531 U.S. 98, 109 (2000).

²¹ *Id.*

issues not before the Court were left to be addressed (if at all) on another day, perhaps by another court. To read *Bush v. Gore* as being grounded in no constitutional principle, and therefore to have no precedential value whatsoever, is antithetical to the rule of law.

How then should we interpret the Court's equal protection holding? From a doctrinal perspective, there are at least two *Bush v. Gores*—that is, two ways of understanding the underlying principle for which it stands.²² Both have found some currency in lawsuits brought since 2000.

The first and more common understanding of *Bush v. Gore* interprets the case as articulating a rule against *inter-jurisdictional inequality* in the administration of elections. This interpretation draws on *Bush v. Gore*'s citation to three “one [person], one vote” cases.²³ One of those cases was *Reynolds v. Sims*, in which the Court held it to be a “fundamental principle of representative government” that there should be equality of representation without regard to “place of residence.”²⁴ On this theory, the fundamental problem with Florida's 2000 recount was the fact that different standards were being applied in different counties, resulting in the differential weighting of some of those counties' votes compared to others.²⁵

The most common form that this claim has taken is illustrated in the federal cases brought in five states, challenging disparities arising from the use of punch card voting equipment in some counties but not others.²⁶ This

²² See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 48–50 (2004).

²³ *Bush*, 531 U.S. at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)), 107 (citing *Gray v. Sanders*, 372 U.S. 368 (1963) and *Moore v. Ogilvie*, 394 U.S. 814 (1969)).

²⁴ *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964). This reading might also draw on the anti-entrenchment rationale that lies at the heart of the “one person, one vote” cases. The failure to redraw lines resulted in malapportioned districts that benefitted incumbents in less populated, rural areas in states like Alabama. See Tokaji, *First Amendment*, *supra* note 12, at 2484–85 (viewing the “one person, one vote” rule as a means by which to prevent the political playing field from being tilted against certain groups); Heather K. Gerken, *The Costs and Causes of Judicial Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1421 (2002) (discussing the “lock-up” theory for judicial intervention in malapportionment cases). So, too, the failure to replace unreliable voting equipment might hold benefits for some incumbent legislators to the extent that the other side's voters are disproportionately harmed by them.

²⁵ See *Bush*, 531 U.S. at 106 (noting county-to-county variation in recount standards).

²⁶ For a description of these cases, see Richard B. Saphire & Paul Moke, *Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229, 278–94 (2006). See also Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1729–30 (2005) (listing cases).

first sort of claim might have been made even if *Bush v. Gore* had never been decided. To the extent that *Reynolds* and its progeny forbid cross-county inequalities in apportionment, it is no great stretch to argue that cross-county inequalities in the counting of votes also present an equal protection problem. In fact, the punch card cases arguably have more in common with *Reynolds* than *Bush*, insofar as plaintiffs in both cases present evidence of *statistically demonstrable* inequalities far stronger than what was available immediately after the 2000 election. What *Bush v. Gore* adds—or at least clarifies—is the idea that the principle of equal treatment to voters across counties may apply to matters of election administration.²⁷ It does not, of course, explain precisely how much inequality should be tolerated; but then neither did the early “one person, one vote” cases. Rather, on this reading, *Bush v. Gore* stands for a general principle of inter-jurisdictional equality in the administration of elections, leaving it to future courts to ascertain the degree of inequality that is constitutionally impermissible.

The other leading interpretation of *Bush v. Gore* is more institutional in character, focusing on the *excessive discretion* vested in the local officials charged with overseeing elections. On this reading, the fundamental problem with which the Court was concerned was the possibility of partisan manipulation arising from the absence of clear standards for conducting manual recounts. I have elsewhere advanced this interpretation of *Bush v. Gore*, likening it to First Amendment cases such as *Shuttlesworth v. Birmingham*,²⁸ in which the Court struck down overly vague speech-licensing schemes on the ground that they left too much discretion in the hands of local officials, thereby facilitating the systematic suppression of disfavored viewpoints.²⁹

The second interpretation of *Bush v. Gore* draws upon its emphasis on “the absence of specific standards” for conducting a recount. Without such standards, there was a pronounced danger that Florida law’s general “intent of the voter” standard might be manipulated by partisan election officials in Florida’s sixty-seven counties.³⁰ Just as the absence of specific standards for regulating speech once allowed local officials to suppress the political speech of unions³¹ and civil rights demonstrators,³² the absence of specific standards

²⁷ *Bush*, 531 U.S. at 104.

²⁸ 394 U.S. 147, 150 (1969).

²⁹ Tokaji, *First Amendment*, *supra* note 12, at 2488–90; *see also* Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643, 1654–96 (2005); Pildes, *supra* note 22, at 49 n.100.

³⁰ *Bush*, 531 U.S. at 106.

³¹ *Thornhill v. Alabama*, 310 U.S. 88, 89 (1940).

³² *Shuttlesworth*, 394 U.S. at 147.

for counting votes would allow partisans to suppress the votes of those favoring the other side's candidate.

Although cases focusing on excessive discretion in the administration of elections have been less common, they more closely resemble the facts of *Bush v. Gore*. One such case was *Schering v. Blackwell*, brought in an Ohio federal court on November 2, 2004, the day of the general election.³³ The complaint alleged that Ohio's failure to implement "specific standards" for determining how provisional ballots should be counted violated the Equal Protection Clause.³⁴ The case was reportedly brought at the behest of the Republican Party,³⁵ but was eventually dropped.³⁶ A still-pending case that relies on such a theory is *League of Women Voters of Ohio v. Blackwell*.³⁷ The complaint in that case raises a number of different claims, but its principal thrust is an attack on the State of Ohio's failure to articulate specific standards governing its system of election administration.³⁸ As Professor Foley notes, this could turn out to be among the most significant cases since *Bush v. Gore* if it proceeds to judgment.³⁹

These two interpretations of *Bush v. Gore* are not mutually exclusive. In fact, I have argued for both, the first as a litigator⁴⁰ and the second as a scholar.⁴¹ In the end, however, the most important ramification of *Bush v. Gore* to date is probably not doctrinal. Even more significant is its signal that

³³ For a description of *Schering*, see Tokaji, *Early Returns*, *supra* note 13, at 1232–33.

³⁴ Complaint, *Schering v. Blackwell*, No. 1:04-cv-755 (S.D. Ohio Nov. 2, 2004), available at <http://moritzlaw.osu.edu/electionlaw/litigation/st-ohio.php>.

³⁵ Tokaji, *Early Returns*, *supra* note 13, at 1233.

³⁶ Stipulation of Dismissal, *Schering v. Blackwell*, No. 1:04-cv-755 (S.D. Ohio Mar. 15, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/st-ohio.php>.

³⁷ 340 F. Supp. 2d 823 (N.D. Ohio 2004).

³⁸ Complaint, *League of Women Voters v. Blackwell*, No. 3:05-cv-7309 (N.D. Ohio July 28, 2005), available at <http://moritzlaw.osu.edu/electionlaw/docs/ohio/LWV05/lwv-complaint5.pdf>.

³⁹ Foley, *supra* note 11, at 943.

⁴⁰ I have served as an attorney for plaintiffs in three cases challenging punch card voting equipment: *Stewart v. Blackwell*, 444 F.3d 843, 845 (6th Cir. 2006), *vacated and remanded as moot*, 473 F.3d 692 (6th Cir. 2007) (en banc); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *vacated*, 344 F.3d 914 (9th Cir. 2003) (en banc); and *Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001).

⁴¹ Daniel P. Tokaji, *Political Equality After Bush v. Gore*, in *THE FINAL ARBITER: THE CONSEQUENCES OF BUSH V. GORE FOR LAW AND POLITICS* 107, 115–21 (David P. Banks, David B. Cohen & John C. Green eds., 2005).

the federal courts are open for business when it comes to election administration claims.⁴²

That signal was clearly received, both by the parties and by citizen groups. Since the 2000 election, there has been a significant increase in election administration lawsuits.⁴³ Ohio alone saw litigation regarding a number of subjects—including voting technology, registration, provisional voting, voter identification, challenges to voter eligibility, and long lines at the polls—around the time of the 2004 election.⁴⁴ Of course, not all of these cases expressly rely on *Bush v. Gore*. In fact, some of the post-2000 litigation is not constitutional at all, arising instead from disputes over the interpretation of the Help America Vote Act of 2002 (“HAVA”)⁴⁵ or other statutes, and would probably have been filed even if the Court had never granted certiorari. Still, the Supreme Court’s 2000 intervention is at least partly responsible for the subsequent boom in election-related lawsuits, even if the magnitude of *Bush v. Gore*’s signaling effect is impossible to measure with precision. As I explain in Part III, this has mostly been a good thing.

III. ELECTION ADMINISTRATION IN THE LOWER COURTS

Post-*Bush v. Gore* litigation over election administration has had some salutary effects. These lawsuits have, in some cases, resulted in favorable judgments that protected voting rights.⁴⁶ In other cases, they have advanced reform through settlement or other means, despite plaintiffs’ failure to secure a favorable judgment. Even where those cases have been unsuccessful, as with lawsuits challenging the refusal to count “wrong precinct” provisional ballots in 2004, pre-election litigation has clarified the rules for voters, parties, and election officials.⁴⁷ Particularly when such litigation is brought well in advance of election day, it can help avoid messy and protracted post-election litigation over who really won.

I do not here revisit all of the areas of election administration that have generated lawsuits since 2000,⁴⁸ but instead focus on the two most contentious ones: voting technology and voter identification. These are the

⁴² As Professor Foley notes, Sam Issacharoff made this point at the Symposium. See Foley, *supra* note 11, at 991.

⁴³ Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 957–58 (2005).

⁴⁴ Tokaji, *First Amendment*, *supra* note 12, at 1220–39.

⁴⁵ Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified at 42 U.S.C. §§ 15301–15545).

⁴⁶ See Tokaji, *Early Returns*, *supra* note 13, at 1230–31, 1234–36, 1238–39.

⁴⁷ *Id.* at 1246.

areas that have provided the most fertile ground for litigation. On the whole, the lower courts have done a respectable—though certainly not perfect—job of handling these cases. Even where plaintiffs have not obtained a judgment in their favor, this litigation has often had beneficial consequences. These conclusions are necessarily somewhat impressionistic and, no doubt, influenced by my own views regarding the merits of the disputes addressed below. But even if one does not share that perspective, a careful study of these cases provides at least some reason for optimism regarding the lower courts' ability to handle the many election administration cases that have emerged since 2000.⁴⁹

A. Voting Technology

The first wave of post-*Bush* lawsuits focused mainly on voting equipment, primarily the unreliable “hanging chad” punch card voting systems used in Florida and many other parts of the country. Wielding strong statistical evidence that this equipment resulted in more lost votes than other systems,⁵⁰ civil rights advocates filed cases challenging this equipment in five states: Florida, Georgia, Illinois, California, and Ohio.⁵¹ All of these cases rely on the inter-jurisdictional equality interpretation of *Bush v. Gore* and the “one person, one vote” cases that it cited. Lower courts have arrived at a fair and administrable constitutional standard, and these cases, moreover, have effected change by way of settlement. More recently, a second wave of voting technology cases, this one challenging electronic voting equipment, has emerged. Although these cases have met with somewhat less success so far, this is not due to confusion in the lower courts over the law that should be applied. It is instead the consequence of evidentiary shortcomings in the plaintiffs' proof. On the whole, the lower courts have capably handled the voting technology litigation before them, without the need for Supreme Court intervention.

In the first wave of post-*Bush* voting equipment litigation, the Illinois and California cases quickly yielded favorable opinions for those challenging

⁴⁸ See *id.* at 1220–39. Professor Foley's article provides a helpful survey of the post-*Bush* constitutional litigation. See Foley, *supra* note 11, at 976–80.

⁴⁹ For a less optimistic view of the impact of the litigation that has followed *Bush v. Gore*, see Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. (forthcoming Oct. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976701.

⁵⁰ See Saphire & Moke, *supra* note 26.

⁵¹ Tokaji, *Early Returns*, *supra* note 13, at 1210 n.26.

punch cards.⁵² The district courts in both cases concluded that the inter-county variations arising from the use of punch card voting equipment in some counties but not others stated a claim under the Equal Protection Clause. Both courts also concluded that the disproportionate impact on minority voters was held sufficient to state a claim under § 2 of the Voting Rights Act of 1965. These two cases, along with the Florida case, ultimately resulted in settlements that effectively ended the use of punch card voting equipment.⁵³ Only the Ohio litigation proceeded to trial. The district court entered judgment for the state after a trial, in an opinion that deals with the constitutional standard only in cursory fashion.⁵⁴ However, as explained below, that judgment was later reversed by a panel of the Sixth Circuit and ultimately vacated as moot by the en banc court.

There have been opinions from two appellate panels holding that the use of punch card voting equipment violates the Equal Protection Clause: one from the Ninth Circuit in *Southwest Voter Registration Education Project v. Shelley* (“SVREP”)⁵⁵ and the other from the Sixth Circuit in *Stewart v. Blackwell*.⁵⁶ Although both panel opinions were ultimately vacated by en banc courts, which ultimately disposed of the appeals on procedural grounds, they both warrant attention since they represent the most sustained treatment of the Equal Protection Clause’s application to voting equipment disparities.

The SVREP case challenged California’s use of punch card voting machines in its October 2003 recall election. After the district court had denied plaintiffs’ preliminary injunction motion, a three-judge panel issued an injunction postponing California’s recount election until after the replacement of punch card voting machines, scheduled for March 2004. The Ninth Circuit panel relied not only on *Bush v. Gore*, but also on the “one person, one vote” cases, culling from them “the basic principle of representative government . . . [that] the weight of a citizen’s vote cannot be

⁵² *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002); *Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001).

⁵³ Consent Decree and Final Judgment, *Common Cause v. Jones*, No. 01-03470, 2002 WL 1766410 (C.D. Cal. May 9, 2002); Order Approving Settlement, *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002); Order, *NAACP v. Harris*, No. 01CV120 (S.D. Fla. Sept. 12, 2002). The Georgia case became moot when Georgia adopted new voting equipment. See Suggestion of Mootness by Plaintiffs, *Andrews v. Cox*, No. 2001CV32490 (Ga. Super. Ct. June 11, 2002); email from Neil Bradley, ACLU Voting Rights Project, to Dan Tokaji, (Feb. 22, 2007, 10:09:00 EST) (on file with author).

⁵⁴ *Stewart v. Blackwell*, 356 F. Supp. 2d 791 (N.D. Ohio 2004).

⁵⁵ 344 F.3d 882 (9th Cir. 2003), *vacated*, 344 F.3d 913 (9th Cir. 2003) (en banc).

⁵⁶ 444 F.3d 843 (6th Cir. 2006), *superseded by* 473 F.3d 692 (6th Cir. 2007) (en banc), *vacating as moot* 356 F. Supp. 2d 791 (N.D. Ohio 2004).

made to depend on where he lives.”⁵⁷ That opinion, however, was ultimately vacated by the en banc court, which affirmed the district court’s decision to deny a preliminary injunction. Instead of squarely addressing the equal protection claim on its merits, the en banc court relied on the district court’s discretion in weighing competing harms on a preliminary injunction motion, as well as the undesirability of enjoining an election that had by then already begun, due to some voters’ having already cast absentee ballots. On the merits of plaintiffs’ equal protection claim, the en banc Ninth Circuit had little to say, conclusorily stating simply that the question was “one over which reasonable jurists may differ,” and thus that the “district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits.”⁵⁸ While one might criticize the en banc court for ducking the constitutional issue, the result is defensible. If the Ninth Circuit opinion did not clarify the law, it did not muddy it either.

In the Ohio litigation, a divided panel of the Sixth Circuit also held that the use of punch card voting machines in some counties but not others violated the Equal Protection Clause. Like the Ninth Circuit panel in *SVREP*, the *Stewart v. Blackwell* majority relied on the evidence of the higher likelihood of ballots not being counted in counties using punch card voting equipment.⁵⁹ And like the *SVREP* panel, the Sixth Circuit panel found a principle of inter-jurisdictional equality in *Bush v. Gore* and the “one person, one vote” line of cases upon which it relied. In condemning the inter-jurisdictional inequalities arising from disparities in voting equipment, the *Stewart* panel quoted *Reynolds*’ language providing that “the weight of a citizen’s vote cannot be made to depend on where he lives.”⁶⁰ As in the Ninth Circuit, however, the panel opinion was short-lived. The Sixth Circuit granted a rehearing en banc and, in January 2007, issued an order finding the case to be moot due to Ohio’s replacement of its punch cards in 2006.⁶¹ This order terminated the last of the first-wave voting technology cases.

Although punch cards are now virtually extinct, there are likely to be more lawsuits challenging voting technology under the Equal Protection Clause. As counties began to move away from paper-based systems, like the punch card, to direct record electronic (“DRE”) systems after 2000, some advocates and computer scientists began to worry about the security risks

⁵⁷ Sw. Voter Registration Educ. Project, 344 F.3d at 895 (quoting *Reynolds v. Sims*, 377 U.S. 533, 567 (1964)).

⁵⁸ Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

⁵⁹ *Stewart*, 444 F.3d at 862–67.

⁶⁰ *Id.* at 866 (quoting *Reynolds v. Sims*, 377 U.S. 533, 567 (1964)).

⁶¹ *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007) (en banc).

associated with this relatively new form of voting technology.⁶² This prompted a second wave of post-*Bush* voting technology cases challenging the use of paperless electronic voting machines. As in the punch card cases, plaintiffs rested their cases on inter-county disparities in the equipment used, but, so far, these cases have met with little success. In *Weber v. Shelley*, the Ninth Circuit rejected a challenge to the Sequoia electronic voting equipment used in Riverside County, finding no evidence that this equipment was less reliable than other equipment used in the state.⁶³ And in *Wexler v. Anderson*, the Eleventh Circuit rejected Florida voters' challenge to electronic voting equipment used in that state, also finding no evidence that voters in those counties were less likely to have their votes counted.⁶⁴ In both cases, the courts concluded that no "severe" burden on the right to vote had been proven and, therefore, strict scrutiny of the challenged practice need not be applied.⁶⁵

At first glance, there might appear to be inconsistency between the now-vacated panel opinions in *SVREP* and *Stewart* on the one hand, and those in *Weber* and *Wexler* on the other. While the former cases found an equal protection violation arising from the use of punch card voting equipment, the latter two rejected equal protection claims arising from the use of paperless voting technology. A closer look at the rationale of these cases, however, shows the differences to be more apparent than real. Where the cases differ is not in the legal rule they apply, but in their facts.

The post-*Bush* election technology cases all recognize that impediments to the right to vote may sometimes warrant searching judicial review. As the Court stated in *Reynolds*: "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."⁶⁶ At the same time, these cases recognize that not every election practice with an incidental impact on participation triggers strict scrutiny. This is consistent with the analytic framework set forth in *Burdick v. Takushi*,⁶⁷ under which "severe" restrictions on voting rights must satisfy strict scrutiny while "reasonable, nondiscriminatory" ones may be upheld if they are justified by the states'

⁶² I discuss these issues in depth in Tokaji, *Paperless Chase*, *supra* note 26, at 1734-37, 1773-94.

⁶³ *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003).

⁶⁴ *Wexler v. Anderson*, 452 F.3d 1226, 1232 n.9 (11th Cir. 2006).

⁶⁵ *Id.* at 1233; *Weber*, 347 F.3d at 1106.

⁶⁶ 377 U.S. at 562; *see also* *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (noting that restrictions on fundamental rights must be "closely scrutinized and carefully confined").

⁶⁷ 504 U.S. 428 (1992).

“important regulatory interests.”⁶⁸ *Burdick* is far afield from all the post-*Bush* cases on its facts, having to do with a prohibition on write-in voting rather than the administration of elections. Still, the analysis applied in the lower courts comports with its framework.

In *SVREP* and *Stewart*, the panels found statistically demonstrable, inter-county disparities arising from the use of punch cards.⁶⁹ By contrast, in the electronic voting cases, no such statistical disparities were proven.⁷⁰ Relying on *Burdick*’s framework, the *Weber* and *Wexler* courts concluded that the election practices challenged fell into the “reasonable, nondiscriminatory” category that is *not* subject to strict scrutiny rather than the “severe” category that is.⁷¹ It was precisely on this basis that the *Wexler* court distinguished the panel opinion in *Stewart*, which at that time was still in effect, noting that the Florida plaintiffs had not even alleged the sort of inter-county disparities which the Ohio plaintiffs had proven.⁷² As the district court in *Black v. McGuffage* aptly put it, the operative question is whether the state is using voting equipment with “substantially different levels of accuracy.”⁷³ If such disparities are shown, then strict scrutiny should be applied.

A close reading of these opinions thus confirms that the lower courts are largely in accord as to the legal test that should govern equal protection

⁶⁸ *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

⁶⁹ *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *superseded by* 473 F.3d 692 (6th Cir. 2007) (en banc), *vacating as moot* 356 F. Supp. 2d 791 (N.D. Ohio 2004) (discussing statistical evidence demonstrating higher percentage of residual votes with punch cards); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *vacated*, 344 F.3d 913 (9th Cir. 2003) (same).

⁷⁰ *Wexler*, 452 F.3d at 1232 (“[P]laintiffs, however, did not plead that voters in touchscreen counties are less likely to cast effective votes”); *Weber*, 347 F.3d at 1105 (noting lack of evidence that challenged electronic voting machines were less accurate than other systems).

⁷¹ *Wexler*, 452 F.3d at 1232-33; *Weber*, 347 F.3d at 1106.

⁷² *Wexler*, 452 F.3d at 1233. The events surrounding the 2006 election for Florida’s 13th congressional district might arguably strengthen such a claim. In that race, Republican Vern Buchanan defeated Democrat Christine Jennings by a mere 369 votes. See Rachel Kapochunas, *Democrat’s Challenge in Fla. 13 Focuses on Undervotes*, CQ.COM, Nov. 20, 2006, at page number, http://www.cqpolitics.com/2006/11/democrats_challenge_in_fl_13.html (discussing higher undervote rate in Sarasota County). In Sarasota County, however, there were more than 18,000 electronically-cast ballots on which no vote was recorded for that office—a much higher percentage of undervotes than is commonly seen. *Id.* Still, it is doubtful this incident will support a broad-based challenge to electronic voting technology, given the likelihood that poor ballot design was responsible for the large number of undervotes. See Lauren Frisina et al., *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006 Midterm Elections in Florida* (Sept. 21, 2007), <http://www.dartmouth.edu/~herron/cd13.pdf>.

⁷³ *Black v. McGuffage*, 209 F. Supp. 2d 889, 898 (N.D. Ill. 2002).

challenges to voting equipment.⁷⁴ To the extent they reached different conclusions, they did so based not on differing interpretations of *Bush v. Gore* or the equal protection cases that came before it, but instead upon differences in the evidence that had been presented. The en banc dispositions in the Sixth Circuit and Ninth Circuit also create no conflict in law, since those decisions rested on procedural issues rather than the merits—mootness in the case of *Stewart*, and the impropriety of enjoining a pending election in *SVREP*. On the whole, the lower courts have faithfully applied the Supreme Court's equal protection precedents, including but not limited to *Bush v. Gore*, to alleged disparities arising from voting technology.

On a practical level, these cases have had important effects. Even where there was no published opinion in plaintiffs' favor, they have spurred the prompt elimination of antiquated voting equipment. While the precise impact of *Bush v. Gore* is impossible to measure, the opinion was at the least a contributing factor in these developments. The possibility of equal protection litigation may also turn out to have a salutary effect in the implementation of new voting technology, deterring election officials from using equipment that may have unequal effects or be susceptible to partisan manipulation. It has not proven necessary for the Court to intervene in order for its opinion in *Bush v. Gore* to promote election administration reform, and there seems little compelling reason for it to do so at this time.

B. Voter Identification

Along with voting technology, voter identification is the area of election administration that has received the greatest attention and been the subject of the most significant litigation since 2000.⁷⁵ The rationale generally provided for imposing ID requirements is that they are needed in order to ensure election integrity and, more specifically, to prevent the fraudulent impersonation of registered voters. The need for voter ID was a topic of considerable debate in Congress prior to HAVA's enactment, which focused largely on the tension between access and integrity.⁷⁶ The bill that finally passed included a limited identification requirement, applicable only to first-time voters who registered by mail.⁷⁷ This requirement may be satisfied by presenting either photo ID or a document showing the voter's name and

⁷⁴ I here put aside the en banc dispositions in *Stewart* and *SVREP* which, as noted above, rest principally (and in the case of *Stewart* entirely) on procedural issues rather than the merits of plaintiffs' equal protection claims.

⁷⁵ For a thorough assessment of the legal and policy issues surrounding voter ID, see Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2006).

⁷⁶ See Tokaji, *Early Returns*, *supra* note 13, at 1213.

⁷⁷ 42 U.S.C. § 15483 (2000 & Supp. 2005).

current address, such as a utility bill, bank statement, paycheck, or government document.⁷⁸ In addition, voters are exempt from the ID requirement if, at the time they registered, they provided certain identifying information.⁷⁹

Since HAVA's enactment, several states have moved to impose more demanding voter ID requirements.⁸⁰ Three Republican-dominated state legislatures (Georgia, Indiana, and Missouri) have enacted laws requiring voters to present a government-issued photo ID at the polls to have their votes counted.⁸¹ Several other states have adopted laws that require all those voting at the polls to present some form of non-photographic identification. One of those states is Arizona, whose voters passed an initiative in 2004 requiring voters to present either one form of photo ID or two forms of non-photo ID bearing the voter's name and current address.⁸² Another is Ohio, which enacted an exceptionally convoluted voter ID requirement in 2006.⁸³

Voting rights advocates have challenged voter ID laws under both the Constitution and the Voting Rights Act of 1965. *Bush v. Gore* is of tangential relevance in facial challenges to voter ID, though it has greater relevance in as-applied challenges. Plaintiffs' strongest facial challenge relies primarily on the Supreme Court's 1966 opinion in *Harper v. Virginia Board of Elections*,⁸⁴ in which the Supreme Court struck down a \$1.50 poll tax on equal protection grounds. Although the poll tax was often used to disenfranchise blacks in southern states like Virginia, Justice Douglas' opinion for the Court did not expressly rest on a finding of race discrimination. In a footnote the Court expressly declined to address whether the state's poll tax was used to stop African Americans from voting.⁸⁵ Rather, the Court found there to be a constitutional violation in the heavier

⁷⁸ 42 U.S.C. §§ 15483(b)(1)–(2) (2000 & Supp. 2005).

⁷⁹ 42 U.S.C. § 15483(b)(3) (2000 & Supp. 2005).

⁸⁰ For a summary of state voter ID requirements, see electionline.org, *Voter ID Laws*, <http://electionline.org/Default.aspx?tabid=364> (last visited Oct. 30, 2007).

⁸¹ GA. CODE ANN. § 21-2-417 (2003 & Supp. 2006); IND. CODE ANN. § 3-5-2-40.5 (West 2006); MO. ANN. STAT. § 115.427 (West 2003 & Supp. 2007). Florida also enacted a law requiring voters to present photo ID, but voters who do not have such ID may cast provisional ballots which may be counted even if photo ID is not presented. FLA. STAT. ANN. §§ 101.043, 101.048 (West 2002 & Supp. 2007).

⁸² ARIZ. REV. STAT. ANN. § 16-579(A) (West 2003).

⁸³ OHIO REV. CODE ANN. § 3505.18 (West 2006). For a description, see Daniel P. Tokaji & Chad Eggspuehler, *Voter Identification Requirements in Ohio*, http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules03.html (last visited Oct. 28, 2007).

⁸⁴ *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

⁸⁵ *Id.* at 666 n.3.

burden that the law imposed on citizens of limited means: "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."⁸⁶ The poll tax warranted heightened scrutiny because of the relatively greater burden that it imposed upon people of lesser means.⁸⁷ Significantly, the Court did not insist upon empirical evidence showing that the poll tax would disproportionately affect any particular group of voters.

The *Harper*-based facial attack on photo ID analogizes it to a poll tax. This argument is strongest in cases where the state actually charges a fee for the government-issued photo ID that is needed to vote. A Georgia district court enjoined a photo ID requirement that the state legislature enacted in 2005 on this ground under both the Fourteenth and Twenty-Fourth Amendments. As the court noted in *Common Cause v. Billups*,⁸⁸ Georgia had actually increased its fees for photo ID at the time it enacted this law, up to twenty dollars for a five-year card and thirty-five dollars for a ten-year card.⁸⁹ Requiring a fee in order to obtain an ID that is in turn required to vote is the practical equivalent of a poll tax.

After the district court's initial ruling in *Common Cause v. Billups*, Georgia amended its law in 2006 to allow ID to be obtained free of charge. Such a change did not, however, eliminate the constitutional doubt regarding voter ID requirements under *Harper*.⁹⁰ For one thing, the underlying documents—such as a birth certificate or driver's license—may still cost money. Moreover, even if these documents were provided free of charge, requiring voters to obtain a photo ID still imposes a tax on the voters' time. Someone who lacks a driver's license would have to wait in line once to get a photo ID card, only to face the prospect of waiting in another line when

⁸⁶ *Id.* at 666.

⁸⁷ As the Court put it at the end of its opinion:

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

Id. at 670 (citations omitted).

⁸⁸ *Common Cause v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

⁸⁹ *Id.* at 1337.

⁹⁰ The text that follows appears in substantially similar form in Daniel P. Tokaji, *ID and the Right to Vote*, <http://moritzlaw.osu.edu/electionlaw/comments/2005/050412.php> (Apr. 12, 2005), and Daniel P. Tokaji, *Indiana Photo ID Lawsuit*, http://moritzlaw.osu.edu/blogs/tokaji/2005_04_01_equalvote_archive.html (Apr. 29, 2006, 20:23 EST).

Election Day arrives. It would thus increase the burden on those who wish to vote or, put another way, impose a tax on some voters' time. Even if only a small percentage of eligible voters are discouraged by an ID requirement, that will still be enough to swing some elections. As recent elections from Florida to Washington demonstrate, a few votes can sometimes make a big difference.

There is also evidence that, like the poll tax struck down in *Harper*, a photo ID requirement will not burden all components of the polity equally. A study prepared for the Carter-Baker election reform commission in 2001 found that approximately six to ten percent of the American electorate lacks official state identification.⁹¹ Although there is relatively little empirical evidence on the characteristics of voters who lack ID, a Wisconsin study found stark disparities based on race and other characteristics.⁹² Not surprisingly, racial minorities and poor people were most likely to lack driver's licenses. Statewide, eighty-five percent of white adults had a driver's license.⁹³ By contrast, less than half of the African Americans and Latinos in Milwaukee County possessed a license.⁹⁴ The disparities were even more stark for young black males, with only twenty-six percent of Milwaukee County's African American men between the ages of eighteen and twenty-four possessing a license.⁹⁵ Even though the *Harper* court did not require such statistical evidence of disparate impact in order to uphold a challenge to the poll tax, this type of evidence supports the idea that photo ID requirements will impose comparably unequal burdens on poor and minority voters. The problem for those seeking to challenge voter ID laws is that it is difficult to prove that such laws will have a disparate impact on participation, even if there are reasons for believing that it may.⁹⁶

All three state laws requiring photo ID in order to vote have faced legal challenges. In Missouri, lawsuits challenging the state's photo ID law were

⁹¹ John Mark Hansen, *Verification of Identity*, in TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS, TASK FORCE REPORTS TO ACCOMPANY THE REPORT OF THE NATIONAL COMMISSION ON ELECTION REFORM 4 (2001), available at http://www.tcf.org/Publications/ElectionReform/full_tf_report.pdf.

⁹² John Pawasarat, THE DRIVERS LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN (2005), <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf> (last visited Oct. 28, 2007).

⁹³ *Id.* at 1.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2.

⁹⁶ See Timothy Vercellotti & David Anderson, *Protecting the Franchise or Restricting It? The Effects of Voter Identification Requirements on Turnout* (2006), available at http://www.eagleton.rutgers.edu/News-Research/VoterID_Turnout.pdf (finding that stricter voter identification requirements reduced voter turnout by three to four percent).

likewise filed in both state and federal court.⁹⁷ In October 2006, the Missouri Supreme Court issued an opinion in *Weinschenk v. Missouri*,⁹⁸ which effectively put an end to the matter, holding that the law violated the state's equal protection clause.

On the other hand, Georgia's and Indiana's photo ID laws have thus far survived legal challenge. A lawsuit was filed against Georgia's 2006 ID law in state court.⁹⁹ In September 2006, the Superior Court issued a permanent injunction against the law, holding that it violated the Georgia Constitution's guarantee of the right to vote.¹⁰⁰ The Georgia Supreme Court reversed on standing grounds, finding that the plaintiff actually had a form of ID that would be acceptable under the law.¹⁰¹ The federal district court in *Common Cause v. Georgia* preliminarily enjoined both the 2005 and 2006 ID laws on grounds that they likely violated the Fourteenth Amendment.¹⁰² After trial, however, the district court granted judgment in the state's favor.¹⁰³ The district court held that plaintiffs lacked standing, given their failure to show that the law would prevent any of them from voting.¹⁰⁴ In dicta, the court went on to conclude that it would decline to grant a permanent injunction even if it had jurisdiction.¹⁰⁵ With both the federal and state cases thrown out

⁹⁷ Complaint, NAACP v. Carnahan, No. 06-4200 (W.D. Mo. Sept. 6, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MO-FedIDComplaint.pdf>; Petition for Declaratory, Injunctive, and Class Action Relief, Jackson County v. State, No. 06AC-CC00587 (Cole County Cir. Ct. July 17, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/PetitionforDeclaratoryInjunctiveandClassActionRelief.pdf>; *Weinschenk v. State*, 203 S.W.3d 201 (2006).

⁹⁸ *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).

⁹⁹ Complaint, *Lake v. Perdue*, No. 2006CV119207 (Fulton County Super. Ct. July 3, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LakeVerifiedComplaint.pdf>.

¹⁰⁰ Order on Plaintiff's Complaint for Declaratory and Injunctive Relief, *Lake v. Perdue*, No. 2006CV119207 (Fulton County Super. Ct. Sept. 19, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/StateInjunction.pdf>.

¹⁰¹ *Perdue v. Lake*, 647 S.E.2d 6 (Ga. 2007).

¹⁰² *Common Cause v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006).

¹⁰³ *Common Cause v. Billups*, No. 4:05-CV-0201-HLM, 2007 U.S. Dist. LEXIS 68950 (N.D. Ga. Sept. 6, 2007).

¹⁰⁴ *Id.* at *101-12.

¹⁰⁵ *Id.* at *134 (rejecting plaintiffs' equal protection challenge due to their failure to demonstrate that photo ID is not "reasonably related" to the state's interest in preventing fraud).

for lack of standing, the law took effect in September 2007,¹⁰⁶ though its constitutionality remains uncertain.

Indiana's law is somewhat different from those enacted in Georgia and Missouri, in that voters who cannot afford photo ID are given an alternative option. They may cast a provisional ballot at the polls and, within ten days after the election, are required to complete an affidavit of indigency.¹⁰⁷ Voters cannot complete this affidavit at the polls, but must instead make a separate trip to the board of elections. Although it is difficult to see any good reason for such a requirement other than to make it more difficult for some people to vote, a federal district court granted the State's motion for summary judgment,¹⁰⁸ and a divided panel of the Seventh Circuit affirmed in an opinion discussed below in Part IV.¹⁰⁹

Of the states that have enacted non-photo ID laws, two stand out as particularly significant. One of them is Arizona, the one state in which the Supreme Court has thus far intervened, as detailed below in Part IV. The other is Ohio, in which advocates challenged the implementation of that state's photo ID law based on *Bush v. Gore* and other equal protection cases. Ohio's experience is noteworthy in several respects, including the legislative decision *not* to require photo ID, the legal theory embraced by those challenging the law that was ultimately enacted, and the admirable manner in which it was handled by the district court.

One of the curiosities of Ohio's experience with voter ID is that the state chose *not* to go the way of Georgia, Indiana, and Missouri. Despite the fact that Republicans dominated the state legislature and held control of the Governor's office in 2005, the omnibus election bill that was enacted in 2005 (House Bill 3) did not require voters to show government-issued photo ID in order to have their votes counted. Instead, the law allows various forms of non-photo ID, similar to those permitted by HAVA.¹¹⁰ Although it is always difficult to determine why a legislature chooses not to include a particular provision in a bill, the legislative hearings (in which I testified against a photo ID requirement¹¹¹) suggest that the prospect of a legal challenge was at least partly responsible. In particular, the state senate committee that held

¹⁰⁶ Eric Sturgis, *Voter Photo ID: Few Problems Seen*, ATLANTA JOURNAL-CONSTITUTION, Sept. 20, 2007, at B1.

¹⁰⁷ IND. CODE ANN. §§ 3-11.7-5-1, 3-11.7-5-2.5 (West 2006).

¹⁰⁸ Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

¹⁰⁹ Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007). As discussed below, the Supreme Court has recently granted certiorari. 168 L. Ed. 2d 809.

¹¹⁰ OHIO REV. CODE ANN. § 3505.18 (West 2006).

¹¹¹ Testimony of Daniel P. Tokaji, Ohio Senate Rules Comm., Sub. H.B. 3, June 15, 2005, available at <http://moritzlaw.osu.edu/electionlaw/docs/SubH.B.3Test-SenRules.pdf>.

hearings on the bill seemed very concerned about the prospect of litigation under § 2 of the Voting Rights Act, challenging the likely disparate impact that a photo ID law would have on minority voters.

Shortly before the 2006 general elections, a homeless advocacy group and labor union brought suit to challenge the manner in which Ohio's voter ID law was being implemented.¹¹² The equal protection theory in *Northeast Ohio Coalition for the Homeless* ("NEOCH") v. *Blackwell* is intriguing because it rests largely on variations arising from the discretion vested in local election officials.¹¹³ The case thus brought into play the second reading of *Bush v. Gore*, described in Part II, that focused on excessive administrative discretion.

At the core of the complaint was that key parts of Ohio's ID law were "confusing, vague and impossible to apply."¹¹⁴ It further asserts that parts of this bill impose an "unequal and undue burden" on the right to vote.¹¹⁵ The main focus of the lawsuit was upon inconsistencies in how H.B. 3 would be applied within different Ohio counties. In particular, plaintiffs identify several portions of the new law that were being applied differently within different Ohio counties. Among the inter-county disparities alleged were the following:

- Under Ohio's ID law, one acceptable form of identification is a "current" utility bill, bank statement, or other document. Plaintiffs alleged that Ohio law failed to define the term "current" and that different counties were applying different rules for ascertaining whether the documents presented were acceptable.
- That same provision also refers to "other government document[s]" that suffice to meet the identification requirement. Plaintiffs alleged that county boards of election were applying different standards for determining what this term includes. For example, Cuyahoga County allegedly was accepting any type of

¹¹² Ne. Ohio Coal. for the Homeless v. Blackwell, 467 F.3d 999 (6th Cir. 2006) [hereinafter "NEOCH v. Blackwell"]. Papers from this case are available at <http://moritzlaw.osu.edu/electionlaw/litigation/NEOCHv.Blackwell.php>.

¹¹³ Much of my description of the claims in *NEOCH v. Blackwell* is drawn from a post on my "Equal Vote" blog. Equal Vote, *Ohio Voter ID Lawsuit*, <http://moritzlaw.osu.edu/blogs/tokaji/2006/10/ohio-voter-id-lawsuit.html> (Oct. 24, 2006, 16:23 EST).

¹¹⁴ See generally Complaint, *NEOCH v. Blackwell*, No. C2-06-896 (S.D. Ohio Oct. 24, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCHvBlackwellcomplaint.pdf>.

¹¹⁵ *Id.*

document from any U.S., city, state, or county government entity, while other counties only accepted state or federal documents.

- Ohio's law allows absentee voters to provide their driver's license number instead of ID. But there were actually two different numbers on Ohio driver's licenses—one larger number appearing over the driver's photo, and another smaller number buried on the left-hand side. Mahoning County was allegedly rejecting absentee ballots that have only the first number, while Cuyahoga was counting those ballots.
- Under Ohio's ID law, military ID is an acceptable form of identification *if* it shows the voter's name and "current address." The complaint alleged that some military ID cards do not contain the holder's address. Mahoning and Trumbull Counties were allegedly rejecting military ID cards without the voter's current address, while Cuyahoga was accepting them.
- The complaint also asserted that the Secretary of State's office had failed to provide adequate guidance to county boards of elections, and that the guidance that had been issued "cause[d] more rather than less confusion" on some issues.

Just days before the 2006 election, U.S. District Judge Algenon Marbley issued a temporary restraining order barring the application of Ohio's new ID requirements to absentee voters.¹¹⁶ Judge Marbley found that various parts of Ohio's ID law were "vague" and were being unequally applied by state boards of election. A divided panel of the Sixth Circuit, however, stayed Judge Marbley's order.¹¹⁷ This stay threatened to cause more disruption than it resolved. In particular, it threw into doubt what would happen to the absentee ballots that had been cast during the period that Judge Marbley's order was in effect, at which time voters could reasonably have believed that

¹¹⁶ Temporary Restraining Order, *NEOCH v. Blackwell*, No. C2-06-896 (S.D. Ohio Oct. 26, 2006), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/nochordergrantingTRO.pdf>.

¹¹⁷ Amended Order, *NEOCH v. Blackwell*, Nos. 06-4412, 06-4421 (6th Cir. 2006) (order granting evidentiary hearing), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCH%20amended%20order%20from%20sixth%20circuit.pdf>; *see also* *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006) (explaining reasons for stay).

the ID requirements did not apply to them.¹¹⁸ Only the diligent efforts of Judge Marbley and the attorneys for both sides forestalled a potential post-election crisis. After thirteen hours of intensive negotiations overseen by the court, the parties agreed to a consent order on November 1—the Wednesday before the election—prescribing detailed ID guidelines for both absentee ballots and those cast at the polling place.¹¹⁹

Perhaps even more importantly, the resolution of *NEOCH* case is a reminder of the valuable role that the federal courts can play. District courts are especially well-positioned to gauge the impact of such laws and to fashion appropriate pre-election relief—or encourage a settlement that will clarify the rules of the game. Such judicial intervention is not evident from reading the Federal Reporter or Federal Supplement, but can have a significant impact on the administration of elections. Furthermore, the threat of a lawsuit can serve as a deterrent to state legislatures enacting potentially problematic laws.

IV. THE CASE FOR RESTRAINT: *PURCELL V. GONZALEZ*

The voting technology and voter ID cases described in Part III suggest that the lower court litigation on these issues has had beneficial effects. In the case of voting technology, a rough consensus has emerged over the legal standard that should govern such cases. In the case of voter ID, there is greater reason for questioning the dispositions reached, but the lower courts have generally demonstrated an appropriate attention to the evidence. In both areas, moreover, there have been settlements that improved the administration of elections without the need to go to trial. Of course, the lower courts are not perfect. They do not always do a thorough job of sifting through the evidence, translating four-decade-old precedents to new circumstances, or crafting remedies. But the cases I have described should provide at least some reason for confidence in the lower courts' ability to handle the complex legal and factual issues that have arisen with increased frequency in the administration of elections.

Unfortunately, the same cannot be said of the Supreme Court. The Court's one significant intervention in election administration since 2000,

¹¹⁸ For discussion of this issue, see Daniel P. Tokaji, *Sixth Circuit Stays Ohio TRO*, <http://moritzlaw.osu.edu/blogs/tokaji/2006/10/sixth-circuit-stays-ohio-tro.html> (Oct. 30, 2006, 09:48 EST).

¹¹⁹ Consent Order, *NEOCH v. Blackwell*, No. C2-06-896 (S.D. Ohio Nov. 1, 2006) (agreeing to act in accordance with consent order), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCHConsentOrd.pdf>; *see also* Mark Niquette & Kevin Mayhood, *Parties Settle Voter ID Lawsuit*, COLUMBUS DISPATCH, Nov. 2, 2006, at A1; Julie Carry Smyth, *Voter ID Dispute Settled in Talks*, AKRON BEACON-JOURNAL, Nov. 2, 2006, at A1.

Purcell v. Gonzalez, can most charitably be described as careless.¹²⁰ This case provides a worrisome sign for those hoping for an evenhanded and thorough consideration of the competing values surrounding voter ID and other politically charged election administration issues.

To be fair, it should be noted that the lower courts in *Purcell* failed to handle the matter with the care for which one would hope.¹²¹ The case involved a challenge to provisions of Arizona's Proposition 200, including its ID requirements described in Part III. The problems started with the district court, whose denial of a preliminary injunction the Supreme Court eventually upheld. The district court conducted a hearing on plaintiffs' preliminary injunction motion on August 30 and 31, 2006. This schedule ought to have allowed plenty of time for an order to issue and for an orderly appellate process before the November 2006 election. On September 11, the district court issued a brief order denying plaintiffs' motion for a preliminary injunction against Proposition 200's identification requirements.¹²² But the district court did not issue findings of fact and conclusions of law in support of its order at that time. Those findings and conclusions did not appear until a month later—and less than a month before the election—on October 12.¹²³

By that time, the Ninth Circuit had already ruled on plaintiffs' "emergency and urgent" motion for an injunction pending appeal, which had been filed on September 23.¹²⁴ On October 5, a two-judge panel of the Ninth Circuit issued a brief order granting the emergency motion and enjoining Proposition 200's registration and identification requirements pending the

¹²⁰ See generally Bob Bauer, *The United States Supreme Court at the Polls, in Arizona: The More Things Change . . .* (Oct. 21, 2006), http://www.moresoftmoneyhardlaw.com/updates/election_administration.html?AID=844. Though the thoughts on *Purcell* in the text below are my own, my thinking benefitted from reading Mr. Bauer's analysis.

¹²¹ The description of *Purcell* below appears in substantially similar form in my "Equal Vote" blog. Daniel P. Tokaji, *The Supreme Court's Arizona Intervention*, <http://moritzlaw.osu.edu/blogs/tokaji/2006/10/supreme-courts-arizona-intervention.html> (Oct. 23, 2006, 17:15:00 EST).

¹²² Order Denying Preliminary Injunction, *Gonzalez v. State*, No. CV 06-1268-PHX-ROS (D. Az. Sept. 11, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/arizonaorder9-11-06.pdf>.

¹²³ Order Denying motion to Expedite, *Gonzalez v. State*, No. CV 06-1268-PHX-ROS (D. Az. Oct. 11, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/AZfindingsoffactandconclusionsoflaw.pdf>.

¹²⁴ Motion of Petitioner-Appellants, *Gonzalez v. State*, No. CV 06-1268-PHX-ROS (9th Cir. Sept. 28, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ITCA-9-28-06EmergencyandUrgentMotionforInjunctionPendingAppeal.pdf>.

election.¹²⁵ Like the district court's original order denying an injunction, the Ninth Circuit's order did not explain its reasoning. It would certainly have been preferable for the Ninth Circuit to have issued some explanation of its rationale, at least after the district court finally issued its findings and conclusions on October 12.

Thus, by the time the matter got up to the Supreme Court, the lower courts had already handled the litigation in a less-than-exemplary fashion. It does not, however, follow that it was necessary or appropriate for the Supreme Court to intervene. The Court might have waited for additional action from the Ninth Circuit, which had had only a few days to consider the district court's findings and conclusions. The Court might also have given the en banc Ninth Circuit an opportunity to overrule the panel. Lastly, if the Court had felt it absolutely necessary to correct the Ninth Circuit, the Court might have issued a brief order vacating the injunction and remanding with instructions for reconsideration in light of the district court's findings and conclusions. This would have been an appropriately restrained response under the circumstances, given that district court findings on the balance of hardships are entitled to deference on appeal. By issuing a short order requiring the Ninth Circuit to consider the district court's finding, the Court might have avoided enmeshing itself in the merits.

Instead, the Court compounded the errors of the lower courts, issuing a *per curiam* opinion that does more to confuse than to clarify, despite its invocation of the need for "clear guidance."¹²⁶ The Court was right to note that "[c]onfidence" in the integrity of elections is important.¹²⁷ It was also right to say that any assessment of the constitutionality of voter ID rules requires consideration of both the state's interests in preventing voter fraud and the voter's interests in not being turned away or having their votes rejected. Where the Court's reasoning goes awry is in its abbreviated but distressing analysis of the arguments made by each side.

As an initial matter, the Court's cursory analysis of the constitutional issue proceeds in backwards fashion. The conventional approach to equal protection questions is to first analyze the burden on plaintiffs' protected interests. In a voting case, that means showing an infringement upon the right to vote. If a sufficiently serious infringement of the right to vote is established, then the defendant is required to show that its action is narrowly

¹²⁵ Order Granting Emergency Motion for Injunction, *Gonzalez v. State*, No. 06-16706 (9th Cir. Oct. 3, 2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/06-16706_000.pdf.

¹²⁶ *Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006).

¹²⁷ *Id.* at 7.

tailored to serve compelling government interests.¹²⁸ Instead of following this conventional analysis, the Court started at the back, asserting that the state has a “compelling interest in preserving the integrity of its election process.”¹²⁹ Perhaps this should be taken as an indication, or at least an assumption, that strict scrutiny is the appropriate standard for judging Arizona’s ID law, but the Court’s opinion is not clear on this point.

Much more troubling is the Court’s discussion of the state’s purported interests. Without any pretense of evidence, the Court asserts that “[v]oter fraud drives honest citizens out of the democratic process”¹³⁰ Yet the Court fails to identify any evidence of significant fraud—or for that matter, of *any* fraud—in Arizona’s election system that the state’s ID requirement would stop. It certainly did not identify any evidence to support its presumption that such fraud, if it existed, would deter “honest citizens” from voting. Instead, the Court relies on a misguided comparison between voters’ *perceptions* that elections are filled with fraud and vote dilution. According to the Court: “Voters who fear [that] their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”¹³¹ But to the extent that this is true—and again, the Court offers no evidence to support its assertion—any “disenfranchisement” is of their own making. It is a result of their own decision not to vote.

The Court goes on to compare the fear of fraud that presumably underlies Arizona’s law to violations of the “one person, one vote” rule articulated in *Reynolds v. Sims*.¹³² This is a false comparison. In *Reynolds*, for example, the Court was faced with malapportioned legislative districts that gave some counties’ votes a fraction of the weight of others, by as much as a 41:1 margin. Contemporary allegations of voting fraud, though seldom quantified,¹³³ are not remotely comparable to *Reynolds* or even to subsequent cases finding “one person, one vote” violations with smaller variances.¹³⁴

Perhaps this is devoting greater attention to the Court’s words than they were intended to bear. The opinion was undoubtedly written in haste, given the expedited timetable for consideration. It is not even clear whether the portion of the Court’s opinion that I have discussed above is meant to address

¹²⁸ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)) (holding that “severe” restrictions on voting must be “narrowly drawn to advance a state interest of compelling importance”).

¹²⁹ *Purcell*, 127 S. Ct. at 7.

¹³⁰ *Id.*

¹³¹ *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

¹³² *Id.*

¹³³ See Overton, *supra* note 75, at 631 (noting paucity of good data on the prevalence of voting fraud).

¹³⁴ For a more detailed explanation, see Tokaji, *supra* note 121.

the merits. Although the language might seem to support it, the Court cannot seriously be read as saying that a “fear” of widespread fraud, however unwarranted by the facts, can justify the adoption of measures that result in the rejection of eligible voters’ votes. For at the end of its analysis, the Court does acknowledge, albeit somewhat begrudgingly, that plaintiffs have a strong interest in exercising their fundamental right to vote.

To its credit, the Court does recognize that “the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges.”¹³⁵ Unfortunately, the Court itself fails to give such careful consideration to the evidence put forward by plaintiffs in the case before it.¹³⁶ The irony is that the Court, while rightly asserting the need for “confidence” in the integrity of our electoral system, issued an opinion that instills little confidence in its institutional capacity to handle election administration disputes.

Viewed in the most favorable light, the Supreme Court’s opinion might be read to mean that: (1) district courts should promptly provide an explanation for their intervention in election disputes at the time that they make those decisions;¹³⁷ and (2) courts of appeals should generally defer to district courts’ findings regarding the balance of hardships on a preliminary injunction motion.¹³⁸ The Court is right to say that courts of appeal should give deference to the discretion of district courts when it comes to weighing competing harms. That is particularly true in a case involving the administration of elections, where the inability of an appellate court to hear evidence directly could well impede its ability to weigh the equities.

Still, the Court would have been better off declining review in the Arizona ID case. It certainly was not necessary to correct bad law from the Ninth Circuit, since that court’s brief order made no law at all. In fact, far from correcting bad law, the Supreme Court made some of its own. Perhaps

¹³⁵ *Purcell*, 127 S. Ct. at 7.

¹³⁶ See *Gonzalez Respondents’ Response to Application for Stay of Injunction Pending Appeal in the United States Court of Appeals for the Ninth Circuit, and Appendix thereto, Gonzalez v. State*, No. 06-16702 (9th Cir. Oct. 16, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/gonzales%20opposition.pdf>.

¹³⁷ While upholding the district court’s denial of a preliminary injunction, its opinion contains a gentle but unmistakable chastisement of that court for the one-month delay in issuing findings on a preliminary injunction motion involving an impending election. *Purcell*, 127 S. Ct. at 7 (“Despite the time-sensitive nature of the proceedings and the pendency of a request for emergency relief in the Court of Appeals, the District Court did not issue its findings of fact and conclusions of law until October 12.”). As I have suggested above, this implied criticism of the district court is entirely warranted.

¹³⁸ *Id.* (“It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.”).

the Court viewed itself as policing an out-of-control circuit court. This description does not fit the facts of *Purcell* very well, given the limited time the Ninth Circuit had to consider the district court's findings (nine days) before the Supreme Court joined the fray. Moreover, even if such policing were the Court's objective, a brief order directing the Ninth Circuit to reconsider in light of the district court's late-issued findings, along with a reminder of the deference that district courts' discretion is owed at the preliminary injunction stage, would have sufficed.

Unfortunately, the Court's most cogent point—that appellate courts should generally defer to district courts' discretion in issuing preliminary relief—is at risk of getting lost in the fog of *Purcell*'s reasoning. The Sixth Circuit certainly appears to have missed this point in its reversal of the temporary restraining order (TRO) that Judge Marbley issued in the *NEOCH* litigation involving Ohio's ID requirement.¹³⁹ In issuing a TRO, Judge Marbley had weighed the evidence and determined that Ohio's vague new ID requirements were resulting in confusion; yet, the Sixth Circuit majority declined to defer to his discretion as *Purcell* suggests an appellate court should. Instead, it relied on *Purcell* for the proposition that “court orders affecting elections can themselves result in voter confusion.”¹⁴⁰ While this is undoubtedly true, it overlooks the fact that the district court in *NEOCH* had found that the disruption arising from failing to issue a TRO outweighed the disruption arising from issuing a TRO. As Judge Tarnow pointed out in dissenting from the panel's opinion, the majority provided no good reasons for failing to respect Judge Marbley's discretion on this point.¹⁴¹ And as I have already explained, only the diligent subsequent work of Judge Marbley and the parties—who labored to arrive at a clear and workable consent order—averted a potentially messy post-election fight over whether to count ballots lacking proper ID.

Judge Posner's opinion for the Seventh Circuit in *Crawford v. Marion County Elections Board*,¹⁴² the Indiana ID case, is also a worrisome sign in terms of *Purcell*'s potential impact. Like the *Purcell* opinion that he cites in passing, Judge Posner's breezy analysis pays little attention to either the evidence before it or to the Court's precedent on the constitutional test applicable to electoral practices that infringe on the right to vote.¹⁴³ It does

¹³⁹ *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006). See *supra* Section III.B. for further discussion of the *NEOCH* case.

¹⁴⁰ *NEOCH*, 467 F.3d at 1012.

¹⁴¹ *Id.* at 1013.

¹⁴² *Crawford v. Marion County Elections Bd.*, 472 F.3d 949 (7th Cir. 2007).

¹⁴³ For a cogent critique of *Crawford*, see Bob Bauer, *Posner on Photo ID: The Unbearable Cleverness of Being Wrong* (Jan 5, 2007), <http://www.moresoftmoneyhardlaw.com/news.html?AID=901> (last visited Oct. 30, 2007).

not even cite *Harper* and relies upon assumptions regarding the impact of Indiana's photo ID law that are not supported by the evidence of record.¹⁴⁴ Although it is very unlikely that *Purcell* influenced the Seventh Circuit majority's disposition, the opinions share a careless approach to the evidence and a fuzzy conception of the underlying democratic values at stake in the voter identification debate.

The Supreme Court has recently granted certiorari in *Crawford*,¹⁴⁵ and the case will be argued in 2008. Given the Court's careless treatment of the subject in *Purcell*, there is reason to be concerned about how it will deal with this case. Much depends on how to weigh the competing harms alleged by challengers and defenders of voter ID. There is relatively little evidence on both sides at present,¹⁴⁶ though that is likely to change in years to come. Instead of granting certiorari in *Crawford*, the Court should have awaited a case presenting a more fully developed record that included empirical research on the harms and benefits of voter identification.

Even more important than getting the facts right is getting the law right, and here there is great reason for questioning whether the current Court is up to the challenge. To some extent, the issues at stake in the voter ID debate resemble those which are in play in the redistricting and campaign finance cases that are the subject of many of the other papers in this Symposium. In all of these cases, there is a pronounced risk that incumbent legislators will pass laws that are designed to protect their own interests—be it personal interests in being reelected or partisan interests in advancing the interests of their party. Yet the Court's treatment of partisan gerrymandering and campaign finance provides little confidence that the Court will do better

¹⁴⁴ For example, Judge Posner's opinion speculates on the "elusive" benefits of voting, as though to suggest that the value of exercising this fundamental right can be reduced to a cost-benefit analysis. He proceeds to discuss the legal test applicable to voter ID laws in cost-benefit terms. *Crawford*, 472 F.3d at 951–52 ("The fewer the people who will actually disfranchise themselves rather than go to the bother and, if they are not indigent and don't have their birth certificate and so must order a copy and pay a fee, the expense of obtaining a photo ID, the less of a showing the state need make to justify the law."). But as set forth above, *Harper* does not require an empirical demonstration of an unequal impact in order to trigger heightened scrutiny. On the alleged benefits flowing from the state's ID requirement, Judge Posner casually brushes aside the absence of evidence to show that there is any fraud in the state that its ID law would prevent. He instead substitutes his own speculative explanation that "endemic underenforcement of minor criminal laws" explains the absence of any prosecutions for voting fraud. *Id.* at 953. In effect, his opinion places the burden of proving a negative—namely, that there is little or no fraud in the state's voting system—on the plaintiffs challenging ID laws.

¹⁴⁵ Petition for Writ of Certiorari, *Indiana Democratic Party v. Rokita*, Case No. 07-25 (July 2, 2007), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/rokita-cert.pdf>.

¹⁴⁶ See Overton, *supra* note 75, at 631.

when it comes to voter identification or other areas of election administration. It would be far better for the Court to allow further development of these issues in the lower courts before injecting itself into yet another hot-button area of election administration.

There are considerable harms that could flow from further Supreme Court intervention in election administration at this stage. Most obviously, the Court would stand to lose the benefits of allowing the issue to percolate in the lower courts and for clearer empirical evidence on the impact of voter ID to emerge. Even more serious is the potential damage to the Court's credibility that might flow from further intervention in a hot-button issue that tends to divide legislators along party lines. When lower courts make mistakes, their opinions do much less damage than erroneous decisions from the Supreme Court. That is true not only because their precedential impact is narrower, but because lower court decisions receive far less attention. By choosing to intervene in the voter ID controversy, the Court risks reopening wounds still raw from *Bush v. Gore*. The potential for further damage to the Court's credibility—which some may believe not yet to have healed from the blow it suffered after 2000—is considerable.

V. CONCLUSION

For legal scholars, it is tempting to focus myopically on the opinions of the Supreme Court and disregard what is happening in the lower courts. It is even more tempting to pay attention only to published decisions and ignore other effects that lower court litigation is having in terms of promoting settlement and otherwise inducing change. To ignore such effects in the area of election administration would be to miss an important, positive aspect of *Bush v. Gore*'s legacy. Whatever harm to the ideal of evenhanded justice might have arisen from the result in that case, there have been benefits to the increased election administration litigation that followed.

The lower courts, particularly federal district courts, have done a respectable if imperfect job of handling post-2000 election administration disputes. The courts have generally shown an appropriate suspicion of practices that would unequally burden democratic participation and careful attention to the evidence regarding the true effects of such practices. Election administration cases tend to be ones in which small differences in facts can matter greatly in assessing such matters as whether a particular practice imposes a "severe" burden on participation. Federal district courts are ideally suited to sift through the evidence in such cases. They are also well-suited to balance the competing harms arising from a pre-election injunction in a way that is likely to be much more difficult for a faraway appellate court, especially the Supreme Court. Moreover, lower court litigation over election administration—while surely not an unmitigated good—has had some

notable beneficial effects, prompting settlement in some cases and clarifying the rules of the game in others. The law-clarifying effect of election litigation can be especially useful when lawsuits are brought well in advance of Election Day.

By contrast, the Supreme Court's intervention in *Purcell* was anything but constructive or clarifying. Though the Court correctly recognized the importance of deference to district court discretion in weighing the equities at the preliminary injunction stage, its discussion of the constitutional issues at play provides ambiguous guidance for the lower courts. The Court's opinion also demonstrated little regard or interest in the practical realities of election administration practices, either in Arizona or in other states that may be implicated by *Purcell*'s ruling. Perhaps it is their dramatic distance from the realities of election administration—something that the Supreme Court justices share with appellate judges like Judge Posner—that makes it especially difficult for them to comprehend the on-the-ground implications of their decisions in this area.

This Article has not attempted to develop a comprehensive theory of when the Supreme Court should intervene in election administration matters. It would certainly be imprudent to draw general lessons on this subject from a single case. Still, *Purcell* illustrates the need for particular caution when the Court intervenes in this area. That is so because of the practical complexity and difficult-to-measure implications of such cases, as well as their politically sensitive character. While clear rules on when to grant review are probably impossible to draw, the Court should not generally be in the business of granting review simply to correct a mistake, as it appears to think it was doing in *Purcell*. The immense political sensitivity of issues like voter identification and electronic voting means that missteps that the Court makes are likely to be magnified, potentially doing considerable damage to the institutional credibility upon which it depends.

The dangers of Supreme Court intervention in election administration are compounded when, as in *Purcell*, it must act on an expedited basis. Justice O'Connor has recently been quoted as saying of *Bush v. Gore*: "I don't think what emerged in the last opinion was the court's best effort. It was operating under a very short time frame, to say the least. Given more time, I think we probably would've done better."¹⁴⁷ Even those of us who believe there to be a strong foundation for *Bush v. Gore*'s equal protection reasoning must agree with her on this point. It is a point that applies with at least the same force to *Purcell*. When intervening in elections, it is vitally important—both to its

¹⁴⁷ Michiko Kakutani, *A Court No Longer Divided: Conservatives in Triumph*, N.Y. TIMES, Jan. 23, 2007, at E1 (reviewing JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007)).

own credibility and to our democracy—that the Court always put forward its best efforts.

